UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON D.C.

CAESARS ENTERTAINMENT CORPORATION d/b/a RIO ALL-SUITES HOTEL AND CASINO and INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, DISTRICT COUNCIL 15, LOCAL 159, AFL-CIO	**Case Nos. 28-CA-060841**

BRIEF OF THE SCREEN ACTORS GUILD-AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS AS *AMICUS CURIE*

JULIE GUTMAN DICKINSON
IRA L. GOTTLIEB
HECTOR DE HARO
BUSH GOTTLIEB, A Law Corporation
801 North Brand Boulevard, Suite 950
Glendale, California 91203
Telephone: (818) 973-3200
Facsimile: (818) 973-3201
jgutmandickinson@bushgottlieb.com
hdeharo@bushgottlieb.com

REBECCA HAYES
Broadcast Manager and Labor Counsel
for the Screen Actors Guild-American
Federation of Television and Radio Artists
1900 Broadway, 5th Floor
New York, NY 10023
Telephone: (212) 863-4232
Facsimile: (212) 532-2625

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I. QUESTIONS PRESENTED

On August 1, 2018, in Case No. 28-CA-060841, the Board invited the filing of briefs by the parties and interested *amici* to address the following questions:

> 1. Should the Board adhere to, modify, or overrule *Purple Communications*?
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> 2. If you believe the Board should overrule *Purple Communications*, what standard should the Board adopt in its stead? Should the Board return to the holding of *Register Guard* or adopt some other standard?
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> 3. If the Board were to return to the holding of Register Guard, should it carve out exceptions for circumstances that limit employees' ability to communicate with each other through means other than their employer's email system (e.g., a scattered workforce, facilities located in areas that lack broadband access)? If so, should the Board specify such circumstances in advance or leave them to be determined on a case-by-case basis?
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> 4. The policy at issue in this case applies to employees' use of the Respondent's "[c]omputer resources." Until now, the Board has limited its holdings to employer email systems. Should the Board apply a different standard to the use of computer resources other than email? If so, what should that standard be? Or should it apply whatever standard the Board adopts for the use of employer email systems to other types of electronic communications (e.g., instant messages, texts, postings on social media) when made by employees using employer-owned equipment?

II. STATEMENT OF INTEREST

SAG-AFTRA and its pre-merger constituent unions, the Screen Actors Guild and the American Federation of Television and Radio Artists, have been advocating for employees in the entertainment industry since the 1930s. With the merger of the two unions in 2012, SAG-AFTRA now represents approximately 160,000 actors, announcers, broadcasters, journalists, news writers, producers, and editors, as well as program hosts, dancers, DJs, puppeteers, recording artists, singers, stunt performers, voiceover artists, and other media professionals. SAG-AFTRA is committed both to obtaining the strongest possible protections for its current members and to helping other media professionals across the country organize to improve their working conditions. SAG-AFTRA therefore has a profound interest in ensuring employees

across the country are able to exercise their Section 7 rights by freely communicating with their coworkers, representatives, and others regarding their terms and conditions of employment. This ability for workers to communicate with each other—and SAG-AFTRA's ability to assist those workers to improve their working conditions—would be greatly impeded if the Board defied the realities of the modern workforce and returned to the outdated standard from *In Re the Guard Publ'g Co. ("Register Guard")*, 351 NLRB 1110 (2007)—a standard which conflicted with the Supreme Court's own guidance in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

III. INTRODUCTION

Today's workplace communications methods do not resemble those of the 1930s and 1940s when Congress enacted the National Labor Relations Act (the "Act") and the Taft-Hartley Act. The Board itself has recognized the "increasing prevalence of electronic communications at and away from the workplace," *In Re J & R Flooring, Inc.*, 356 NLRB 11 (2010) (requiring electronic distribution of remedial notices), and studies show that "email is still the most ubiquitous form of business communication."[1] Moreover, a growing number of employees across the country do not work in a traditional workplace where hundreds of employees show up at one location, start their shift at the same time, take their breaks at the same time over the same watercooler or in the same breakroom, and then have lunch at the same time in a designated lunch room. For twenty-first century employees generally, and especially those outside of traditional, industrial workplaces, email and other forms of electronic communication have become integral to their ability to adequately communicate with their coworkers. This

[1] *Email Statistics Report, 2018-2022*, The Radicati Group, Inc. at 2 (March 2018) *available at* https://www.radicati.com/wp/wp-content/uploads/2018/01/Email_Statistics_Report,_2018-2022_Executive_Summary.pdf.

transformative fact makes it critical that the Board continue to interpret and apply the tenets underlying the Act to suit the modern workforce and workplace.

The question at the core of these cases is a simple one—what right do employees have to communicate about terms and conditions of employment when employer property rights might be implicated? The Supreme Court has directly addressed the question of the proper balance between an employer's rights and employees' right to engage in protected Section 7 communications. *Republic Aviation,* 324 U.S. 793; s*ee also Eastex, Inc. v. N.L.R.B.,* 437 U.S. 556 (1978).

This precedent makes clear that the Board must, at minimum, uphold the *Purple Communications* rule as applied to employer email and expand the rule to apply to employer provided computer equipment and other forms of electronic communications. *Purple Commc'ns, Inc.*, 361 NLRB 1050 (2014). This precedent also supports the Board going even further in accommodating the realities of the modern workplace by recognizing that communications about terms and conditions of employment should inherently be considered "work related," and by recognizing that the distinction between work time and non-work time has become blurred in many of the workplaces where email and texting have become a predominant form of communication. This recognition would engender a further expansion of the scope of *Purple Communications*.

Even if the Board does not take this further expansive step, a failure by the Board to uphold the *Purple Communications* standard as applied to all forms of electronic communications and employer-provided computer equipment would proclaim a return to an illogical standard that violates Supreme Court guidance and interferes with the rights of all employees who communicate with contemporary business tools and devices. *Register Guard* was

a flawed decision giving undue weight to employer property interests by relying on inapposite Board decisions regarding physical equipment with physical limits on the volume of communications that can be supported at any one time. Returning to such a standard would be diametrically opposed to the tenets underlying the Act.

Efforts by employer and industry groups to encourage the Board to roll back its *Purple Communications* decision are based not on valid legal arguments but on demonstrated employer animus to the type of protected Section 7 communications in which today's employees routinely partake, particularly regarding union activity. In fact, *amici* on behalf of Purple Communications Inc., before the Ninth Circuit, have—in direct contravention to basic NLRA doctrine—argued that employers should have the right to limit union-related communication in particular, because they are "adverse to the company's business interests," while allowing other kinds of "non-business related" use of company email.[2] Those "adverse interests" to which employers reflexively object are in fact integral to the very collective bargaining relationships the Act encourages. In making these arguments, employer groups ignore both the realities of the modern workplace and the Supreme Court's clear guidance regarding the intersection of employer's property and managerial rights with employees' rights to engage in Section 7 activity. In sum,

[2] *See* Brief of *Amici Curiae* HR Policy Ass'n, et. al., at 9-10 n.5 in *NLRB v. Purple Communications*, Ninth Circuit Case No. 17-70948 (submitted October 10, 2017). This stance is antithetical to the Act because decades of case law make clear that employers cannot make access decisions that discriminate in particular against protected Section 7 communications. *See e.g. Litho Press of San Antonio*, 211 NLRB 1014 (1974) ("[W]e find the Respondent's rule prohibiting access to its premises by off-duty employees only if they engaged in union activities to be discriminatory and to be violative of Section 8(a)(1) of the Act."); *New Jersey Bell Tel. Co.*, 308 NLRB 277, 281 (1992) ("It has long been established, however, that a denial of access for Section 7 activity may constitute unlawful disparate treatment when a property owner permits similar activity in similar, relevant circumstances.").

the Board should sustain, and preferably expand, the principles enunciated in *Purple Communications* in order to meet the needs of employees in the contemporary digital era.

IV. ARGUMENT

The Board has long recognized that the right of employees to communicate in the workplace regarding their terms and conditions of employment is integral to their ability to exercise their Section 7 rights. *See LeTourneau Co. of Georgia*, 54 NLRB 1253, 1260 (1944), affirmed sub nom, *Republic Aviation*, 324 U.S. 793 ("employees cannot realize the benefits of the right to self-organization guaranteed them by the Act unless there are adequate avenues of communication open to them . . . for the interchange of ideas necessary to the exercise of their right to self-organization."); *NLRB v. Silver Spur Casino*, 623 F.2d 571, 581-82 (9th Cir. 1980) ("The freedom to communicate is essential to the effective exercise of organizational rights granted to employees under Section 7 of the Act."). Further, the Board has held that "[t]he place of work is a place uniquely appropriate for dissemination of views concerning the bargaining representative and the various options open to the employees." *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 516 (1978) (citing *NLRB v. Magnavox Co.*, 415 U.S. 322, 325 (1974); *Eastex*, 437 U.S. 556).

This right to communicate in the workplace was at issue in *Republic Aviation*, where the Supreme Court held that an employer's property rights are not absolute and must, in some circumstances, give way to an employee's right to communicate about terms and conditions of employment. *See Republic Aviation*, 324 U.S. at 803 (quoting lower court for proposition that "[i]nconvenience or even some dislocation of property rights, may be necessary in order to safeguard the right to collective bargaining."). In fact, once employees are already lawfully on an employer's property—such as when an employer gives employees access to its email system—property rights become irrelevant and "it is the 'employer's management interests rather than [its]

property interests' that primarily are implicated." *Eastex*, 437 U.S. at 573 (quoting *Hudgens v. NLRB*, 424 U.S. 507, 521-22, n.10 (1976)). *Purple Communications* represented the Board's successful effort to harmonize this area of law dealing with physical access and oral communications in a physical workplace, with the growing importance of ubiquitous electronic communication for all employees in the contemporary workforce.

A. Purple Communications Was Correctly Decided and Should Not Be Overturned

In *Purple Communications*, the Board held that "employee use of email for statutorily protected communications on nonworking time must presumptively be permitted by employers who have chosen to give employees access to their email systems.." *Purple Commc'ns*, 361 NLRB 1050. In reaching that decision, the Board exercised its long-recognized affirmative responsibility "to adapt the Act to changing patterns of industrial life." *Hudgens*, 424 US 523 (quoting *NLRB v. J. Weingarten, Inc.*, 420 US 251, 266 (1975)); *Boeing Co.*, 365 NLRB No. 154 (December 14, 2017). As a result, the Board abandoned its previous *Register Guard* decision because that decision "undervalued employees' core Section 7 right to communicate in the workplace about their terms and conditions of employment, while giving too much weight to employers' property rights." *Purple Commc'ns*, 361 NLRB at 1053. In addition, the Board discounted the *Register Guard* decision because "the *Register Guard* majority inexplicably failed to perceive the importance of email as a means by which employees engage in protected communications, an importance that has increased dramatically during the 7 years since *Register Guard* issued." *Id.* The Board also recognized that "the *Register Guard* majority mistakenly placed more weight on the Board's equipment decisions than those precedents can bear." *Id.*

Rather than comparing employee use of employer provided email systems to much different forms of communication that have inherent physical limitations on concurrent use, such

as bulletin boards or copy machines, the Board balanced competing rights as approved by the Supreme Court in *Republic Aviation*, "the leading case addressing employees' right to communicate on their employer's property about their working conditions." *Id.* at 1054. *Republic Aviation* looked at how and when employees can engage in Section 7 communications in the context of a traditional, industrial workplace where employees are in one location and the proverbial water cooler can be an actual water cooler where employees gather on their break. *Purple Communications* was, in part, the Board's recognition that in the modern workforce, fewer employees engage in this face-to-face gathering to compare notes and decide whether and how to organize, particularly in workplaces that no longer resemble the traditional workplace at issue in *Republic Aviation* and thus make such face-to-face gathering impossible. From employees who spend much of their day in the field, to employees who work from home part-time, to employees who do not even have a physical worksite because the entire company only meets virtually, the modern workforce has turned to email as a natural gathering place for protected conversations. *Purple Commc'ns*, 361 NLRB 1057 ("[E]mail has effectively become a "natural gathering place," pervasively used for employee-to-employee conversations."); *See generally Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (U.S. 2017) ("While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace . . . .")

SAG-AFTRA's own membership provides perfect examples of this phenomena. Many SAG-AFTRA broadcasters and news professionals, in particular, work fulltime or part-time for a single employer and use a company e-mail account to communicate with their employer and co-workers on a daily basis. This workforce relies heavily on electronic communications, in large part because employees are often physically separated from one another during a typical

workday, frequently for long stretches. Many reporters spend a large portion of their day "out in the field," conducting interviews and securing footage or audio of the day's news out in the community. Other journalists are away for extended periods "on assignment," often many hours from the station, or even overseas. Certain units also include members who work fulltime out of news bureaus located several states away from the flagship office.

Additionally, as news is a twenty-four hour business, broadcast employees often work different shifts with little or no overlap with their union co-workers. As in other industries, news professionals are also increasingly working remotely, completing assignments from home during at least part of the week. As a result, employer provided e-mail is often the only feasible means of communication for broadcast professionals for discussing both work and Section 7 matters. The ubiquitous use of employer e-mail has led to the phasing out of more traditional means and venues of communication in the workplace, such as union bulletin boards or physical mailboxes that can be stuffed with flyers. As fewer and fewer employees consistently report to the employer's workspace for the same set hours each day, or at all, even notices posted in common spaces, such as kitchen areas or water coolers, are no longer effective means for employees to exchange information. Indeed, the pervasive presence of electronic communications is standard and has become an additional natural gathering place even in workplaces with common physical work spaces and gathering locations.

This is the exact evolution that the Board recognized in *Purple Communications* when it held that an employer's property rights over its email system is not absolute and must yield to employees' rights to have Section 7 communications regarding terms and conditions of employment. The Board also recognized, however, that the right of employees to communicate

using employer provided email is not unlimited. In addition to establishing a presumption of access *only during non-work time*, the Board recognized other limits on this right of access:

> First, it applies only to employees who have already been granted access to the employer's email system in the course of their work and does not require employers to provide such access. Second, an employer may justify a total ban on nonwork use of email, including Section 7 use on nonworking time, by demonstrating that special circumstances make the ban necessary to maintain production or discipline. Absent justification for a total ban, the employer may apply uniform and consistently enforced controls over its email system to the extent such controls are necessary to maintain production and discipline.
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> *Purple Commc'ns*, 361 NLRB 1050.

By carefully circumscribing employee email access in this fashion, the Board acknowledged and reinforced the employer's ultimate control over its email systems, recognizing that employers have certain property and managerial rights that are not extinguished. In light of these limitations, none of the arguments raised against maintaining the *Purple Communications* presumption are persuasive.

1. Employers Can Ban Personal Use of Email and Place Other Non-Discriminatory Limits on Access to Prevent Negative Business Consequences

One of the main arguments raised by individuals and groups seeking to overturn *Purple Communications* is that this presumption opens the door for employees to begin sending thousands of emails a day, at all hours of the day, overloading email systems and leading to a decrease in productivity. These arguments have no support when viewed in light of the restrictions on access allowed by the Board.

In the first instance, the alleged threat of email systems becoming overloaded by employees' Section 7 communications is of little practical concern. Modern email systems do not resemble physical bulletin boards which have limited space for information and where one message could crowd out another message, so vague arguments about these email systems being

overburdened are disingenuous. Instead, modern email systems can handle hundreds of emails simultaneously without any detriment to the system itself[3]—even the cost of storing text-based messages has plummeted in recent years.[4] Allowing for this possibility, however, the Board made clear that its decision does "not prevent an employer from establishing uniform and consistently enforced restrictions, such as prohibiting large attachments or audio/video segments, if the employer can demonstrate that they would interfere with the email system's efficient functioning." *Purple Commc'ns*, 361 NLRB 1064. These restrictions, and other possible restrictions such as automatic deletion of old emails, eliminate any alleged burden that Section 7 communications would have on an email system, and also address any security fears such as the possibility that attachments or links will infect an employer's email system.

In addition, while true that excessive non-work emails may affect productivity, the number of protected Section 7 communications that may occur are dwarfed by the number of personal emails that employees could (and do) send. This is where the arguments for overturning *Purple Communications* begin to approach absurdity: employers claim that it would be prohibitive to attempt to monitor employee use of email for Section 7 activity to ensure it is happening on non-work time. Yet, if employers are truly worried about productivity issues, those employers would already have systems in place to monitor and eliminate personal use of its email system. And many employers do—one survey of large employers found that "98% of

[3] *See Intel Corp. v. Hamidi*, 30 Cal. 4th 1342, 1353 (2003) (no evidence that system was slowed or impaired, or that marginal operating costs increased, when employee sent thousands of emails simultaneously on multiple occasions).

[4] Lucas Mearian. "CW@50: Data storage goes from $1M to 2 cents per gigabyte." ComputerWorld (Mar. 23, 2017) *available at* https://www.computerworld.com/article/3182207/data-storage/cw50-data-storage-goes-from-1m-to-2-cents-per-gigabyte.html.

companies monitor their employees' digital activity."[5] It would be a *de minimis* additional burden for employers to also monitor protected communications to ensure it is only occurring during non-work time.

Employer monitoring also provides a strong disincentive for employees to use employer email for extensive discussions regarding Section 7 protected subject matter. While access to employer email is integral to employees exercising their Section 7 rights by communicating with coworkers in this new gathering place, employees will also self-limit the extent of their use both for disciplinary and confidentiality reasons.

Furthermore, the *Purple Communications* line of cases only address the question of blanket restrictions on access—nothing prevents employers from disciplining employees for a demonstrable lack of productivity related to non-work email use as long as that discipline is applied without discrimination as to the nature or content of the non-work emails. Thus, employers' concerns regarding the high volumes of union-related communications on work e-mail is, once again, misplaced.

The argument raised by employers that the Board's jurisprudence around surveillance would make it impossible for them to monitor its email systems without committing unfair labor practices is similarly specious. Again, this concern can easily be remedied by having the employer make its policy on monitoring email public—if employees are aware that they are being monitored, they will have no expectation of privacy and there will be no surveillance violation. As the Board stated in *Purple Communications*:

[5] Locker, Melissa. "Yes, your employer is probably monitoring your Slack or email activity." Fast Company (June 11, 2018) (citing study conducted by Alfresco). And employers who choose not to monitor or stop personal use of email have no lawful argument for only monitoring union related communications.

> [t]he Board has long held that management officials may observe public union activity without violating the Act so long as those officials do not 'do something out of the ordinary. An employer's monitoring of electronic communications on its email system will similarly be lawful so long as the employer does nothing out of the ordinary, such as increasing its monitoring during an organizational campaign or focusing its monitoring efforts on protected conduct or union activists.
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> *Purple Commc'ns*, 361 NLRB at 1065 (internal quotations omitted)

This monitoring can also be used to ensure that employees are not engaging in harassment or other unlawful behavior on the employer's system, eliminating the alleged liability that employers speculate about when foraging for reasons why they should be allowed to restrict protected communications.[6] Thus, employers can protect both their email systems and productivity goals by placing reasonable, non-discriminatory restrictions on employee use of email systems for Section 7 communications (as many already do), and by monitoring its system to ensure compliance with its restrictions. What the employer cannot do, however, is completely eliminate the rights of employees to communicate about terms and conditions of employment through this critical means of communication.

2. Alleged Alternative Means of Communication Are Irrelevant to the Analysis

Another common theme among those advocating for *Purple Communications* to be overturned is that it is unnecessary for employees to use employer provided email to communicate because there are plenty of alternative avenues that employees can use to communicate—such as personal email or social media sites.[7]

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[6] It is also worth noting that employers can eliminate or alleviate their alleged liability by immediately taking action when they discover these acts or when those acts are reported to them by other employees. Further, despite the salacious examples that employers point to, it is rare that something like harassment will nonetheless constitute protected concerted activity.

[7] This claim is particularly suspect because, as described in the next section, an increasing number of employers are actually banning the use of personal email or devices in the workplace.

As argued by the Communication Workers of America in their Brief before the Ninth Circuit, "the Board also made clear that the availability of alternative means of communication is not relevant under long-settled law concerning employee to employee communications in the workplace."[8] This is touched on in *Republic Aviation* itself. In upholding the Board's finding that an employer's property rights must yield to an employee's rights to engage in protected communications, the Supreme Court explicitly recognized that "[n]either in the *Republic* nor the *Le Tourneau* cases can it properly be said that there was evidence or a finding that the plant's physical location made solicitation away from company property ineffective to reach prospective union members." *Republic Aviation,* 324 U.S. 798–99. Thus, although solicitation away from company property might have been an effective way for the employees in *Republic Aviation* to communicate, this did not remove the employees' right to communicate on employer property (the workplace). Analogously, although some employees might have personal email accounts or social media sites or personal phones, this does not eliminate an employee's right to communicate on employer property—in this case, the gathering place represented by employer provided electronic communication systems. *See e.g. Beth Israel Hosp.*, 437 U.S. 505 (1978) ("[T]he availability of alternative means of communication is not, with respect to employee organizational activity, a necessary inquiry.")

Even if the availability of alternative means of communication were germane to the analysis, however, other means of electronic communications do not provide an adequate alternative to employer based e-mail accounts. At SAG-AFTRA, for example, there are longtime broadcasters who do not have personal e-mail or social media accounts. Even for those who do,

[8] Petitioners Reply/Answering Brief, *NLRB v. Purple Communications*, Ninth Circuit Case No. 17-70948.

personal e-mail habits vary widely:[9] many SAG-AFTRA members do not check personal accounts on a regular basis. In contrast, the vast majority of employees check their work e-mail account frequently throughout the course of a normal workday. Employer provided email and other employer provided forms of electronic communication have become a natural work gathering place and are an extension of the workplace for modern employees. Personal email and social media sites have not. This makes personal email and social media accounts inherently inferior to employer email because "the very time and place uniquely appropriate" for protected communications is the workplace, and employer provided email is part of that workplace for today's employees. *see Republic Aviation*, 324 U.S. at 803.

3. *Purple Communications* Does Not Implicate the First Amendment

The other unavailing argument made by individuals advocating for *Purple Communications* to be overturned is that allowing employees to use employer email for Section 7 communications would interfere with the employer's First Amendment rights because the email sender could be viewed as speaking for the employer. In its brief, the General Counsel even includes a vague citation to the Supreme Court's recent decision in *Janus* as allegedly supporting this conclusion. This is nonsense. Indeed, the Board directly addressed these First Amendment concerns in *Purple Communications* and roundly rejected those arguments:

> We are simply unpersuaded that an email message, sent using the employer's email system but not from the employer, could reasonably be perceived as speech by, or speech endorsed by, the employer--particularly a message reflecting a view different from the employer's. Email users typically understand that an email message conveys the views of the sender, not those of the email account provider. They would no more think that an email message sent from a coworker via a work email account speaks for the employer (unless the message was sent by the employer's supervisor or agent) than they would think that a message they receive

[9] Matt Rosoff. "People Either check email all the time, or barely at all." Business Insider (Aug. 17, 2015) *available* at https://www.businessinsider.com/how-often-do-people-check-their-email-2015-8.

> from a friend on their personal Gmail account speaks for Google. Such a message also would not reasonably be perceived as speech by the Government that the employer is required to host, implicating the constitutional compelled-speech doctrine; it is simply speech by the employer's own employees, to whom the employer provided the forum. Nor would the employer's ability to speak or otherwise disseminate its own message be affected merely by providing access to employees. As in *PruneYard*, employers may not only use their email systems to convey their own viewpoints, as they already do, they may also expressly dissociate themselves from viewpoints expressed by users of their email systems, if they find such a clarification necessary. Accordingly, we perceive no compelled-speech issues reasonably arising out of today's decision

Purple Commc'ns, 361 NLRB 1065. The Board's reasoning regarding the First Amendment in *Purple Communications* directly follows from Supreme Court precedent regarding compelled speech, and there is no valid argument the current Board to find otherwise.[10]

Thus, because the *Purple Communications* Board followed clear Supreme Court precedent regarding employee Section 7 rights and regarding the First Amendment, and because the Board has already directly addressed all the arguments currently put forth in favor of overturning *Purple Communications*, this current Board should not even entertain the idea of eliminating the *Purple Communications* presumption. Instead, it would be more proper for the Board to extend its holding from *Purple Communications* to (1) cover other means of communication and devices, and (2) strengthen employees' rights to use those protected means of communication, including employer provided email, for discussions regarding terms and conditions of employment.

[10] *See* Responsive Brief of the General Counsel to *Amici* Briefs, *Purple Communications*, 21-CA-095151, 21-RC-091531, 21-RC-091584 (extensively analyzing Supreme Court precedent regarding compelled speech and demonstrating that allowing employee access to employer email would neither "compel employers to adopt or endorse the Board's views on unionization or any other subject" nor would it "compel employers to accommodate other speakers' messages to the detriment of their own.").

B. The Board Should Extend Purple Communications to Other Forms of Electronic Communication and to Computer Resources

As the Board recognized in *Purple Communications*, "the *Register Guard* majority inexplicably failed to perceive the importance of email as a means by which employees engage in protected communications, an importance that has increased dramatically during the 7 years since *Register Guard* issued." *Purple Commc'ns*, 361 NLRB at 1053. Similarly, in the four years since *Purple Communications* issued, email *and other means of communication* in the workplace have become increasingly important. This includes everything from electronic bulletin boards to instant messaging on an employer's network, to internal social media sites. As these new means of communication, and the computer resources and electronic devices tied to them, continue to represent critical gathering and discussion areas for modern employees, the Board should extend the *Purple Communications* presumption of access on non-work time to these areas.

Today, it would not be strange for an employee to work an entire day at the office with almost no verbal communication with coworkers. Yet, throughout the workday, that employee would be communicating with coworkers by email, or through internal instant messaging on the employer's network (Slack for example), or on message boards and project based collaboration websites. This is even more likely when dealing with employees who work from home or for companies that do not have physical office locations. These new methods of communication raise the same considerations as employer-provided email because they are increasingly the primary method for employees to communicate with each other.

Similarly, the line between personal and work devices is blurring. Some employers provide cell phones and laptops to employees, and for some employees these might be the only devices they own or carry on their person during the workday. Some employees have a personal cell phone they take to work and connect to their employer's wireless internet when at the office.

Some workplaces allow employees to bring their own devices but connect that device to the employer's cell phone plan. Others allow employees to bring their own devices, but reimburse them for the service for that device and/or the device itself. Some employers even disallow the use of personal email or personal devices in the workplace altogether for fear of their network being infected.

All of these situations pit employee rights to communicate with employer's property rights. Analyzing these facts under a mechanical *Register Guard* standard based on an employer's property rights would be inappropriate under Supreme Court precedent and could lead to perverse consequences. Such an approach would create an untenable situation where some employees enjoy Section 7 rights by virtue of the nature of their communication devices, while other employees are restricted in the exercise of those rights based on the arbitrariness of which wireless signal they connect to that day. In the same workplace, there might be one employee who uses an employer provided cell phone exclusively while another employee purchases his own device and is only reimbursed for his service. Under a *Register Guard* standard, the first employee would be prohibited from using that cell phone for Section 7 communications on non-work time, while the second employee would have free reign to use that cell phone for Section 7 communications on his off time.

This arbitrary distinction between one employee having the right to Section 7 communications though a cell phone and one employee being deprived of that right, in the same workplace, is antithetical to the purposes of the Act because Section 7 rights should not depend on whether an employee can afford to purchase a phone or not. The only way to properly balance these competing concerns would be for the Board to adopt a *Purple Communications* presumption in all of these situations. When an employer voluntarily provides employees with

access to a means of communication or with computer equipment—such as giving read/write rights to a message board, allowing the employee to connect a personal cell phone to the employer's network, or giving employees work laptops—employees should have a presumptive right to use those means for Section 7 communications. Just as in *Purple Communications*, however, this holding would be limited: it would only apply when that access or resource is provided by employers voluntarily. Employers would also be able to demonstrate special circumstances necessitating a total ban, and employers would be able to place reasonable, non-discriminatory restrictions on access.

C. The Board Should Recognize that Communications About Terms and Conditions of Employment Are Inherently "Work Related" and That Work-Time and Non-Work Time Are Blurred in Modern Workplaces

In addition to extending *Purple Communications* to computer resources and other means of communication, the Board should go further in recognizing that Section 7 communications about terms and conditions of employment *are* work related, and that the line between work and non-work time has become blurred.

Both *Purple Communications* and the case at hand, *Caesars Entertainment*, examined work rules which prohibited "non-business" use of employer provided systems. One approach the Board could have, and should have, taken in *Purple Communications* was to recognize that such a policy *should not apply to Section 7 communications about terms and conditions of employment* because such communications *are* "business" or "work" related.[11] While employers

[11] Although employers make the claim that electronic communications should actually be considered "distribution of literature," which is much more restricted under Board law than oral solicitations, the Board has recognized that it is inappropriate "to treat email communication as either solicitation or distribution per se [because] an email system is a forum for communication [and messages are most often] merely communications that are neither solicitation nor distribution, but that nevertheless constitute protected activity." *Purple Commc'ns, Inc.*, 361 NLRB 1061–62.

attempt to characterize the communications at issue as "union" communications, Section 7 communications, by their very nature, concern employees' *terms and conditions of employment.* There can be nothing more "business" or "work" related than employees discussing the conditions under which they work every day. Further, these communications remain "business" or "work" related even when they involve non-employee representatives or agents who are assisting employees with issues regarding their terms and conditions of employment. Some of SAG-AFTRA's recent communications with its members demonstrate that Section 7 communications about terms and conditions of employment are inherently intertwined with the employer's business.

SAG-AFTRA and its member leaders now use employer based e-mail accounts almost exclusively to send time sensitive notifications that affect member's physical safety, legal rights, and terms and conditions of employment in the workplace. Recent examples of urgent e-mails sent to members' work e-mail addresses regarding health and safety concerns include reports of possible exposure to carbon monoxide in the workplace in one instance, and toxic fiberglass particulate in a newsroom in another. In both instances, in addition to notifications, access to employer e-mail allowed for efficient communication between affected members and Union staff regarding addressing the source of the hazard with management as quickly as possible.

In successive rounds of media company bankruptcies over recent years, SAG-AFTRA staff has used employer e-mail to send notifications to members regarding the Union's ongoing efforts to protect employees' legal rights to earned wages and benefits in court. The Union used work e-mail to inform employees of all claim filing deadlines set by the Bankruptcy courts for matters such as outstanding grievances. Additionally, the Union used employer e-mails to communicate with members regarding several recent changes in corporate ownership and the

protection of the membership's legal rights in the transition. The Union also informs members about important changes to their health and retirement plans, including a recent merger between two health plans and changes in participating insurance companies. SAG-AFTRA staff also communicates with employees over employer based email about critical matters such as bargaining surveys, bargaining dates, and ratification votes for collective bargaining agreements.

After many years of using employer e-mails in this manner, SAG-AFTRA broadcast members have come to expect to receive notifications regarding time sensitive and important information from the Union in this manner. These types of e-mails typically do not engender voluminous back and forth, either between members or with the Union staff, and thus do not impose a heavy burden on the employer's e-mail system in terms of increased traffic, nor do they impact worker productivity by taking time away from work activities. This is particularly true because in many modern workplaces, the line between work-time and non-work time has been blurred so much that it may as well not exist.

Despite employer's alleged concerns about productivity, an increasing number of employers are explicitly allowing or turning a blind eye to personal use of employer email during working hours—the HR Policy association admits as much in its Ninth Circuit *amicus* brief.[12] Even the Supreme Court, in an unrelated context, has noted that "many employers expect or at least tolerate personal use of [electronic communication equipment] by employees because it often increases worker efficiency." *City of Ontario, Cal. v. Quon*, 560 U.S. 746, 759 (2010); *See also Stengart v. Loving Care Agency, Inc.*, 201 N.J. 300, 307 (2010) ("In the modern workplace,

[12] Brief of *Amici Curiae* HR Policy Ass'n, et. al., at 10 n.5 in *NLRB v. Purple Communications*, Ninth Circuit Case No. 17-70948 (Stating that employers allow personal use of email to "facilitat[e] a sense of community within the workplace, and in recognition of the fact that it is unrealistic to police every single email an employee might send.")

for example, occasional, personal use of the Internet is commonplace"). Further, flexible working arrangements for many employees mean that it is sometimes near impossible to tell what is "work time" and what is "non-work," such as when employees are constantly checking work email at home and personal email at work. In fact, the mere professionalization of much of the modern workforce contributes to this blurring—in a factory on an assembly line, it is clear when someone is working and when someone is not working. With SAG-AFTRA's membership, on the other hand, employees might have short periods of off time during their sometimes prolonged workday while sitting at their desk or dressing room. Even though this may not technically be non-work time, it is actually more efficient for an employee to shoot off some Section 7 communications (or personal emails) during those few minutes than to have to take time off work later in the day to do so. That is why many employers are beginning to focus less on the number of minutes an employee sits at a desk and whether the employee is working during that time, and more on the employees' actual output or productivity.

Employers' increasing permissiveness to completely personal emails, and the blurring between work and non-work time, leaves no principled reason why Section 7 communications should be the only ones restricted to "non-work" time. Because communications regarding terms and conditions of employment are inherently "work" or "business" related, they should be allowed at all times (and even when they involved non-employee representatives).[13] Granted, employers will nonetheless maintain the ability to discipline individuals who fail performance and production metrics, as long as that discipline is applied non-discriminatorily.

[13] In the context of discriminatory discharges, the Board has regularly held that emails concerning terms and conditions of employment remain protected even if presumably done on work time. *See Timekeeping Sys., Inc.*, 323 NLRB 244, 247 (1997); *Hitachi Capital Am. Corp. & Virginia Kish*, 361 NLRB 123 (2014) (emails regarding new employer policy sent during workday are protected).

D. *Register Guard* Was Wrongly Decided

As extensively described above, *Purple Communications* was correctly decided and should be expanded. It is also worth highlighting the flawed reasoning from *Register Guard* that should prevent the Board from returning to such a standard. As an initial matter, the *Register Guard* board erred by relying exclusively on an employer's property rights over its email system because, in *Eastex*, the Supreme Court made clear that it is only an employer's *managerial* interests that are implicated, rather and its property interests, once employees are lawfully on the property in question. *Eastex,* 437 U.S. at 573. In the case of email and other electronic communication systems, only an employer's managerial interests should be considered because employees are lawfully "on the property" once an employer provides them access to the system. *Purple Communications* adequately protects these managerial interests by allowing employers to place reasonable, non-restrictive limits on employee access to those systems.

Even if we take an employer's property interests into account, however, Professor Jeffrey M. Hirsch's briefs and extensive research on this issue compellingly argue that *Register Guard* conflicted with the Supreme Court's decision in *Republic Aviation* because the Board erred by giving more weight to the personal property at issue in email cases than the Supreme Court gave to real property in *Republic Aviation*—a conclusion counter to long established concepts underlying modern property law. In that brief, Professor Hirsch also succinctly described why the Board wrongly applied its previous cases dealing with personal property—such as bulletin boards—to employer email.[14] Similarly, in an amicus brief submitted in this case, Professor Hirsch lays out an indisputable case for why *Republic Aviation* and basic rules of property law

[14] Jeffrey M. Hirsch, Brief to the National Labor Relations Board by Amicus Curiae Professor Jeffrey M. Hirsch, 21-CA-095151, 21-RC-091531, 21-RC-091584.

compel the Board's result in *Purple Communications* and contradict the Board's approach in *Register Guard*.[15] The Board should recognize that *Register Guard* is thus counter to Supreme Court jurisprudence, and should refuse to return to such a flawed standard.

If for some reason the Board ignores the Supreme Court's precedent and does return to the *Register Guard* standard, the Board should institute broad exceptions that protect employees' use of employer based email accounts when employees are not in the same workplace, when employees spend any significant portion of their time out of the office, and when there are no alternative means for employees to communicate with each other.

V. CONCLUSION

Email and other forms of electronic communication have become integral to the modern workforce and are one of the primary forms of communication used in the 21st century workplace. The Board's *Purple Communications* decision adequately recognized this reality and applied Supreme Court precedent to balance employee rights to engage in Section 7 activity with Employer's property and managerial rights. There is no reasoned argument for the Board to return to the antiquated standard espoused in *Register Guard*. If anything, the Board should extend *Purple Communication* to provide even greater protections to employees using employer email or other employer electronic or computer resources.

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[15] Jeffrey M. Hirsch, Brief to the National Labor Relations Board by Amicus Curiae Professor Jeffrey M. Hirsch, 21-CA060841..

DATED: October 5, 2018

Respectfully submitted,

JULIE GUTMAN DICKINSON
IRA L. GOTTLIEB
HECTOR DE HARO

BUSH GOTTLIEB, A Law Corporation
Attorneys for the Screen Actors Guild-American Federation of Television and Radio Artists

By: _____
JULIE GUTMAN DICKINSON

By: _____
HECTOR DE HARO

REBECCA HAYES

BROADCAST MANAGER AND LABOR COUNSEL
SCREEN ACTORS GUILD-AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS

By: /s/ Rebecca Hayes
REBECCA HAYES

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 5th day of October, 2018, a copy of the **BRIEF OF THE SCREEN ACTORS GUILD-AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS AS *AMICUS CURIE*** in Case 28-CA-060841 was electronically filed via the NLRB's E-Filing System, and was served via E-Mail, on the following:

Caren Sencer David A. Rosenfeld WEINBERG ROGER & ROSENFELD 1001 Marina Village Pkwy Suite 200 Alameda, CA 94501-1091 *Counsel for Charging Party*	Electronic Mail csencer@unioncounsel.net drosenfeld@unioncounsel.net
David Dornak Mark Ricciardi FISHER & PHILLIPS LLP 300 South 4th Street, Suite 1500 Las Vegas, NV 89101 *Counsel for Respondent*	Electronic Mail ddornak@fisherphillips.com mricciardi@fisherphillips.com
John McLachlan FISHER & PHILLIPS LLP 1 Embarcadero Center, Suite 2050 San Francisco, CA 94111-3709 *Counsel for Respondent*	Electronic Mail jmclachlan@fisherphillips.com
Jim Walters FISHER & PHILLIPS LLP 1075 Peachtree Street, NE, Suite 3500 Atlanta, GA 30309-3900 *Counsel for Respondent*	Electronic Mail jwalters@fisherphillips.com
Elizabeth Cyr James C. Crowley Lawrence Levien John Koerner AKIN GUMP STRAUSS HAUER & FELD LLP 1333 New Hampshire Avenue, NW, Suite 400 Washington, DC 20036-1564 *Counsel for Respondent*	Electronic Mail ecyr@akingump.com jcrowley@akingump.com llevien@akingump.com jkoerner@akingump.com

Chad Wallace
Counsel for the General Counsel
National Labor Relations Board
Division of Advice
1015 Half St., SE
Washington, DC 20570
Counsel for the General Counsel

Electronic Mail
chad.wallace@nlrb.gov

NLRB Regional Office
Cornele A. Overstreet
Regional Director, Region 28
2600 North Central Avenue Suite 1400
Phoenix, AZ 85004-3099
Phone: (602) 640-2160

Electronic Mail
NLRBRegion28@nlrb.gov

DATED: October 5, 2018

By: 
IAN ZULUETA